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MCI WORLDCOM

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October 27, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Applicability of Georgia MemoryCall Decision; California PUC Decision (CC Docket Nos. 96-98; 98-79; 98-103; 98-161; CCB/CPD 97-30)

Dear Ms. Salas:

This letter is submitted ex parte on behalf of MCI WorldCom, Inc. ("MCI WorldCom") concerning an issue raised in the above-referenced proceedings. Several parties apparently have argued that a 1992 Commission decision, the so-called Georgia MemoryCall Decision,[1] supports the notion that calls terminating to an information service provider's ("ISP's") point of presence ("POP") within a local exchange area inherently are jurisdictionally interstate.

As MCI WorldCom has explained repeatedly,[2] the Commission need not and should not reach this jurisdictional issue in the context of this proceeding. Instead, the Commission need only find that ADSL technology could be used to provide an interstate service, and that GTE's tariff therefore should be allowed to go into effect. Nonetheless, should the Commission consider addressing the jurisdictional issue in this proceeding, it is obvious that the Georgia MemoryCall Decision lends considerable support to the conclusion that originating calls terminating to an ISP's

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[1] Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, Memorandum Opinion and Order, 7 FCC Rcd 1619 (1992) ("Georgia MemoryCall Decision"). A copy is appended herein as Attachment A.

[2] See MCI WorldCom Comments on Direct Cases, CC Docket Nos. 98-79; 98-103; 98-161, filed September 18, 1998; MCI WorldCom Ex parte presentation on ADSL Tariffs, CC Docket Nos. 98-79; 98-103; 98-161, presented October 16, 1998; Ex parte letter from Richard S. Whitt, MCI WorldCom, to Magalie Roman Salas, FCC, CC Docket Nos. 96-98; 98-79; 98-103; 98-161; CCB/CPD 97-30, filed October 19, 1998; Ex parte letter from Mary Brown, MCI WorldCom, to Katherine C. Brown, FCC, CC Docket Nos. 96-98; 98-79; 98-103; 98-161, filed October 27, 1998.

POP within the same local exchange area are jurisdictionally intrastate.[3]

First, the voice mail service at issue in the Georgia MemoryCall Decision proceeding was capable of, and did receive, calls from out-of-state, as well as in-state, locations; these calls could come either from persons routed to the voice mail platform when calling the voice mail customer, or from voice mail customers calling the platform to obtain recorded messages. The Commission found that when a caller is connected to the voice mail service, "there is a continuous two-way transmission path from the caller location to the voice mail service." (para. 9). When the caller happens to be located out-of-state, "there is a continuous path of communications across state lines between the caller and the voice mail service...." (para 9). Only to that extent -- the possibility of an out-of-state caller -- did the Commission find MemoryCall a jurisdictionally mixed service that included interstate communications. In contrast, in the specific case of Georgia customers calling the MemoryCall platform located within the state boundaries, there was no interstate communication; as is explained below, where the caller and the ISP are located within the same state, the communications service is jurisdictionally intrastate.

Second, the Commission concluded in the Georgia MemoryCall Decision that, where interstate communications were involved (i.e., where a party calls to the MemoryCall platform from another state), the FCC's jurisdiction does not end at that ILEC switch, "but continues to the ultimate termination of the call." (para. 12). As the Commission made plain, the ultimate termination point is the MemoryCall platform, the "facilities and apparatus used to provide BellSouth's voice mail service...." (para. 12). Apparently this platform physically resided very close to, if not shared the same central office space with, the ILEC's local switching facilities, and certainly was located within the same state as those facilities (para. 12). In the specific case of ILEC customers calling an ISP located within the same state, the very same analysis applies: jurisdiction over the communications service continues to the "ultimate termination," namely the "facilities and apparatus" used by ISPs to provide the information service platform. Because the ISP platform typically is located within the same local exchange (not to mention the same state), traffic from ILEC end user customers to that platform is jurisdictionally intrastate.

Third, the Georgia MemoryCall Decision preempted the Georgia Public Service Commission's absolute bar to any provision of MemoryCall service to new customers only because the FCC found that: (1) the MemoryCall service is jurisdictionally mixed (para. 12); (2) the interstate and intrastate provision of

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[3] The California Public Utilities Commission reached this very same conclusion in a recent order, a copy of which is appended herein as Attachment B. See Public Utilities Commission of the State of California, Rulemaking 95-04-043, Investigation 95-04-044, Decision 98-10-057, dated October 22, 1998.

MemoryCall service is "practically inseverable" (paras. 13-16); and (3) state regulation in that instance would thwart the Commission's exercise of lawful federal authority over interstate communications (paras. 17-21). In the specific case of ILEC customers calling an ISP located within the same state, none of these three conditions apply. In particular, the traffic between the end user customer and the ISP POP, where both are located within the same state, is not jurisdictionally mixed, but in fact intrastate.

Thus, the Georgia MemoryCall Decision confirms that the appropriate jurisdictional nature of traffic terminating to ISPs is based on the physical location of the end user customer and the point at which that customer is attached to the ISP's network -- the ISP's point of presence. As a result, a telephone call from an ISP customer to an ISP platform is a complete, end-to-end transmission. Because most ISPs have established POPs within the local calling areas of most of their customers, the vast majority of calls from an ISP customer to its ISP will be jurisdictionally local calls.[4] Whether or not an ISP subsequently utilizes other telecommunications services to retrieve the information requested by its customer is irrelevant to determining the jurisdictional classification of calls by its customers to the ISP.

An original and one copy of this letter are hereby submitted to your office for each of the above-referenced proceedings. If you have any questions, please contact the undersigned at 202-776-1553.

Respectfully submitted,

Richard S. Whitt
Director, Federal Affairs/Counsel

cc: Kathy Brown
Larry Strickling
Jane Jackson
John Nakahata
Tom Power
Jim Casserly
Kevin Martin
Kyle Dixon
Paul Gallant

[4] In many cases, an ISP customer could choose to access an ISP by calling a platform located out-of-state, but almost certainly would incur long distance toll charges for that call. Obviously, most ISPs provide local access capabilities precisely so their end user customers will not incur toll charges.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation — 38321

MEMORANDUM OPINION AND ORDER

Adopted: January 16, 1992; Released: February 14, 1992

By the Commission: Commissioner Marshall not present.

1. In this order, we grant a petition filed by BellSouth Corporation (BellSouth) requesting that the Commission preempt a decision by the Georgia Public Service Commission (Georgia PSC) prohibiting provision of BellSouth's voice mail service to new customers in Georgia.

I. BACKGROUND

2. On June 4, 1991, the Georgia PSC issued an *Order* that found that BellSouth had engaged in anticompetitive conduct in Georgia directed at the independent voice mail industry.[1] The Georgia PSC stated that it would develop regulatory controls encompassing: (1) tariffing and rate regulation of enhanced services; (2) comparably efficient interconnection (CEI) requirements; (3) Customer Proprietary Network Information (CPNI) rules; and (4) marketing restrictions, possibly including an entirely separate organization for marketing BellSouth's voice mail service.[2] The Georgia *Order* "froze" BellSouth's voice mail service provided in the state, pending the design and implementation of these regulatory controls and the filing of a cost of service study by BellSouth. BellSouth's provision of the service was temporarily restricted to those customers who had already subscribed, preventing other customers from obtaining this service. The Georgia PSC said that BellSouth's voice mail service is a purely intrastate enhanced service and that its freeze would not, therefore, affect federal interests.[3]

3. On June 14, 1991, BellSouth petitioned the Commission for emergency declaratory relief from the Georgia *Order*.[4] BellSouth requests that the Commission declare that: (1) BellSouth's voice mail service is not a purely intrastate enhanced service; (2) the Commission has jurisdiction over the sale and provision of the interstate portion of its voice mail service; and (3) the Georgia PSC is preempted, pending final resolution of the issues in the *BOC Safeguards Proceeding*,[5] from restricting or barring BellSouth from providing and marketing its voice mail service under the terms and conditions set forth in its approved CEI plan.[6]

4. The BellSouth petition contends that BellSouth's voice mail service is a jurisdictionally mixed service that cannot be separated into distinct jurisdictional portions for purposes of state entry/exit regulation and sales activities.[7] The petition further contends that the Georgia action negates federal communications policy and jurisdiction over the voice mail service as embodied in BellSouth's federal CEI plan and interim waiver for service.[8] The petition argues that preemption of the Georgia *Order* is warranted on two independent grounds: (1) the Georgia *Order* attempts to regulate interstate communications directly; and (2) insofar as applicable to intrastate communications, it negates federal objectives because of the inseverability of voice mail service for purposes of entry/exit regulation and marketing restrictions.[9] The petition also argues that preemption would be consistent with the May 16, 1991 resolution of the Federal-State Joint Conference that enhanced services should not be subject to tariffing and entry/exit regulation.[10]

5. The petition states that the Georgia PSC's allegations of anticompetitive conduct by BellSouth are either untrue, unfounded, or addressed by federal requirements.[11] According to BellSouth, the Georgia PSC *Order* harms the public interest because it prevents thousands of additional customers in Georgia from receiving voice mail

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[1] *In the Matter of the Commission's Investigation into Southern Bell Telephone and Telegraph Company's Provision of MemoryCall Service, Order of the Commission (Order)*, Georgia Docket No. 4000-U (June 4, 1991).

[2] *Id.* at 48-50.

[3] *Id.* at 52-55, 56-57.

[4] Comments and Reply Comments on the BellSouth petition were filed by the parties listed in the attached Appendix.

[5] *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, Notice of Proposed Rulemaking*, CC Docket No. 90-623, 6 FCC Rcd 174 (1990). The Commission has resolved the issues in that proceeding. *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, Report and Order (BOC Safeguards Order)*, CC Docket No. 90-623, FCC 91-381, released December 20, 1991.

[6] BellSouth Petition at 1-2. BellSouth Plan for Comparably Efficient Interconnection for Voice Messaging Services, 3 FCC Rcd 7284, 7291 (1988).

[7] BellSouth Petition at 3, 10-12.

[8] *Id.* at 20-21. In *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), the Ninth Circuit vacated *Computer III*, generally returning the industry to the *Computer II* regime. Shortly thereafter, the Commission waived *Computer II* requirements to permit the Bell Operating Companies (BOCs) to continue to offer enhanced services on an integrated basis pursuant to previously approved CEI plans. Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, 5 FCC Rcd 4714, 4715, para. 10 (Com.Car.Bur. 1990). Computer III Remand Proceedings: Bell Operating Company Safeguards, Notice of Proposed Rulemaking and Order, 6 FCC Rcd at 191, n.135.

[9] BellSouth Petition at 18-19.

[10] *Id.* at 21. The Federal-State Joint Conference on Open Network Architecture was established by the Commission in the *BOC ONA Order* in response to industry and state comments in the *ONA Proceeding* urging the Commission to establish a forum for continuing dialogue and cooperation between the Commission and the states. The Joint Conference serves as a forum to facilitate federal/state cooperation and the successful development and implementation of ONA.

[11] *Id.* at 26-29.

service.[12] The petition also states that the requested relief should be considered on an emergency basis to prevent continued harm to the public.[13]

II. Discussion

6. Whether a state may impose requirements on communications will depend on an analysis under the Supremacy Clause of Article VI of the U.S. Constitution.[14] State requirements are invalid under the Supremacy Clause if they, for example, apply to an area that Congress has intended the federal government to occupy exclusively.[15] We have recently had occasion to reiterate that Congress intended interstate communications to be regulated exclusively by the Commission.[16] Where, as here, interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the States, state regulation of the intrastate service that affects interstate service will not be preempted unless it thwarts or impedes a valid federal policy.[17]

7. In the case before us, the Georgia *Order* bars any provision by BellSouth of its voice mail service to new customers in Georgia. We find that the Georgia *Order* applies in part to an interstate service because BellSouth's voice mail service is jurisdictionally mixed. We also find that it is not possible to separate the interstate and intrastate provision of the service without impermissably barring the interstate provision of the service. We therefore preempt the *Order* insofar as it bars provision by BellSouth of its jurisdictionally mixed voice mail service.[18]

8. *Jurisdictional character of BellSouth's voice mail service.* The Georgia PSC and state commenters contend that BellSouth's voice mail service is a purely or predominantly intrastate service.[19] They contend that when the voice mail service is accessed from out-of-state, two jurisdictional transactions take place: one from the caller to the telephone company switch that routes the call to the intended recipient's location, which is interstate, and another from the switch forwarding the call to the voice mail apparatus and service, which is purely intrastate.[20] The states contend that all of the services associated with the latter transaction, such as call forwarding, are locally tariffed and purely intrastate and that only these services are used in the provision of voice mail service.[21] They contend that the Court of Appeals for the Ninth Circuit, in vacating the preemption of state regulation of enhanced services fashioned by the Commission in *Computer III*, stated that voice mail service is an example of a purely intrastate enhanced service.[22] BellSouth contends that its voice mail service is jurisdictionally mixed in that it is accessed and used by both in-state and out-of-state callers.[23] NYNEX, Bell Atlantic, Central Telephone, several enhanced service providers (ESPs), and a number of other parties who use or manufacture components of voice mail services agree that voice mail is a jurisdictionally mixed service.[24]

9. We conclude, based on the record, that BellSouth's voice mail service is capable of receiving, and does receive, calls from out-of-state as well as in-state locations.[25] These calls can be from persons calling the voice mail customer, or from the customer calling to obtain messages recorded by the voice mail service. As explained by BellSouth, when a caller is connected to BellSouth's voice mail service, receives instructions and/or a message, and records a message, there is a continuous two-way transmission path from the caller location to the voice mail service. When the caller is out-of-state, there is a continuous path of communications across state lines between the caller and the voice mail service, just as there is when a traditional out-of-state long distance voice telephone call is forwarded by the local switch to another location in the state and answered by a person, a message service bureau or customer premises answering device.

10. Under the Communications Act the Commission has jurisdiction, *inter alia*, over "all interstate and foreign communications by wire or radio."[26] Interstate commu-

[12] *Id.* at 22-25.

[13] *Id.* at 2-3.

[14] *Operator Service Providers of America*, 6 FCC Rcd 4475 (1991).

[15] *English v. General Electric Co.*, 110 S.Ct. 2270 (1990); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 (1986); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *See also NY State Commission on Cable TV v. FCC*, 669 F.2d 58, 66 (2d Cir. 1982); *Sceneidewing v. ANR Pipe Line Co.*, 485 U.S. 293 (1988).

[16] *Operator Service Providers of America*, 6 FCC Rcd 4475 (1991).

[17] See cases cited at n.51, *infra*.

[18] Some commenters contend that we should not grant the BellSouth petition because of the allegations of anticompetitive conduct before the Georgia PSC and/or that we should examine those allegations at the federal level. *See e.g.*, Cox Enterprises Comments at 3-9; Compuserve Comments 13; Assn. of Telemessaging Services Comments at 11-13; ATC Comments at 5-6; American Newspaper Publishers Comments at 4-10. The limited step of preempting the Georgia PSC *Order* insofar as it freezes the provision of BellSouth's voice mail service neither requires nor precludes state or federal examination of anticompetitive conduct by BellSouth or other BOCs. The Georgia PSC can continue its proceeding to fashion regulatory controls, and we can carefully examine allegations of anticompetitive conduct by BellSouth or other BOCs.

[19] Georgia PSC Comments at 1-2, 18-21; NARUC Comments at 9-11; DC PSC Comments at 2; California PUC Comments at 7-8; New York DPS Comments at 2; Florida PSC Reply Comments at 2, 5-6. However, the states additionally maintain that some interstate use of BellSouth's voice mail service does not change its essentially intrastate character. The DC PSC argues that BellSouth should be required to certify that at least ten percent of the calls to its voice mail service are interstate. If BellSouth is unable to make such a certification, then the DC PSC argues the voice mail service should not be subject to federal jurisdiction. DC PSC Comments at 3-4.

[20] California PUC Comments at 8-9; NARUC Comments at 10-11; Georgia PSC Comments at 19-20; Florida PSC Reply Comments at 4.

[21] Georgia PSC Comments at 20-21; NARUC Comments at 9.

[22] NARUC Comments at 10-11.

[23] BellSouth asserts that the interstate usage of its voice mail service is sufficient to warrant federal preemption of the Georgia *Order* 's freeze of the service. BellSouth Reply Comments at 2.

[24] NYNEX Comments at 3; Bell Atlantic Comments 1-2; Central Telephone Comments 2; Prodigy Services Comments at 1; MessagePhone Comments at 4-5; California Bankers Comments at 2-5; IBM Comments at 4-5; Unisys Comments at 2; Information Industry Assn. Comments at 9; CompuServe Comments at 2, n. 1; Assn. Telemessaging Services Comments at 4; BT North America Reply Comments at 10.

[25] BellSouth Petition at 10.

[26] 47 U.S.C. Section 152(a).

nications is defined as communication or transmission from one state or the District of Columbia to another.[27] Further, communication by wire is defined as the "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection *between the points of origin and reception of such transmission, including the instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission* (emphasis added)." [28] Thus, under the Act, when a caller to BellSouth's voice mail service is out-of-state, whether it is a person calling the voice mail service to leave a message for the customer or the voice mail customer calling the service to access messages, there is an interstate communication.

11. The language of the Act also contradicts the narrow reading of our jurisdiction urged by the states that would artificially terminate our jurisdiction at the local switch and ignore the "forwarding and delivery of [the] communications" to the "instrumentalities, facilities, apparatus and services" that comprise BellSouth's voice mail service. Indeed, the communications from the out-of-state caller to the local telephone number and switch, its forwarding to the voice mail service by the local switch, and its receipt and interaction with BellSouth's voice mail service, fall within the explicit subject matter jurisdiction of this Commission under the Act.

12. Our jurisdiction does not end at the local switch but continues to the ultimate termination of the call. "The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology.[29] "[J]urisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination."[30] The fact that the facilities and apparatus used to provide BellSouth's voice mail service may be located within a single state, this does not affect our jurisdiction or expand the Georgia PSC's jurisdiction. This Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with origination and termination of interstate calls.[31] The Commission also has made it clear that it has not ceded jurisdiction over call forwarding when used in interstate communications even if that service is locally tariffed.[32] An out-of-state call to BellSouth's voice mail service is a jurisdictionally interstate communication, just as is any other out-of-state call to a person or service. Accordingly, we reject the view that BellSouth's voice mail service is purely intrastate.[33] Like the basic communications services provided by local exchange carriers, it is jurisdictionally mixed.[34] Therefore, the Georgia PSC *Order* prohibiting BellSouth from offering its voice mail service to additional customers directly regulates the provision of interstate communications in the state -- the interstate provision of BellSouth's voice mail service.

13. *Practical Inseverability of Interstate and Intrastate Provision of BellSouth's Voice Mail Service.* The Georgia PSC, the DC PSC, and NARUC contend that the use of SS7 technology will enable BellSouth to identify, and block, calls to the voice mail service that originate in-state.[35] BellSouth avers that it has no feasible means of identifying the origin of the calls to its voice mail service.[36] BellSouth states that, at its current level of deployment, SS7 technology does not enable identification of the origin of calls to the voice mail service, and it will not be able to do so "for a number of years." BellSouth further states that the identification of every interstate call would require all inter-exchange carriers to deploy SS7.[37] Other commenters, such as BellSouth, Bell Atlantic, NYNEX, and several ESPs or other concerned parties, including Prodigy Services, MessagePhone, California Bankers Clearing House, Unisys, and IBM, urge the Commission to preempt.[38] The California PUC would have BellSouth obtain information from interexchange carriers on the origin of specific calls to the voice mail service rather than finding the traffic to be inseverable.[39] The New York DPS asserts that preemption is not warranted because inseverability of interstate and intrastate portions is a valid basis for preemption only in narrow circumstances where contrary state regulation deprives customers of access to interstate basic service.[40] The Florida PSC argues that BellSouth's reliance on the authority of *NARUC v. FCC,* 746 F.2d 1492 (D.C. Cir. 1984) ("NARUC II") to support its jurisdictional arguments is misplaced, because that case concerns a basic service which is not analogous to BellSouth's voice mail service: an interstate WATS service with each call comprising a

[27] 47 U.S.C. Section 153(e).

[28] 47 U.S.C. Section 153(a).

[29] *New York Telephone Co. v. FCC,* 631 F.2d 1059, 1066 (2d Cir. 1980). *See also United States v. AT&T,* 57 F. Supp. 451, 454 (S.D.N.Y. 1944), *aff'd sub nom. Hotel Astor v. United States,* 325 U.S. 837 (1945); *Puerto Rico Tel. Co. v. FCC,* 553 F.2d 694, 699 (1st Cir. 1977); *MCI Communications Corp. v. AT&T,* 369 F. Supp. 1004, 1029 (E.D. Pa. 1973).

[30] *Southern Pacific Communications,* 61 FCC 2d at 146, *citing U.S. v. AT&T,* 57 F. Supp. 451 (S.D.N.Y. 1944).

[31] *MTS and WATS Market Structure (Phase II),* 93 FCC 2d 241 (1983), *aff'd, NARUC v. FCC,* 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied,* 105 S.Ct. 1224 (1985).

[32] *BOC ONA Order,* CC Docket 88-2, 4 FCC Rcd 1,144 n.628 (1988).

[33] Contrary to the assertion of some commenters, the Ninth Circuit did not hold that voice mail service is a purely intrastate enhanced service. *California v. FCC,* 905 F.2d 1217, 1244 (9th Cir. 1990). The issue of whether any particular enhanced service, including voice mail, was purely intrastate was not specifically before the Court nor was any record developed on any particular enhanced service. The Court noted that state petitioners had identified certain services, including voice mail service, as purely intrastate and faulted the Commission, in its preemption analysis, for failing to consider whether some enhanced services might be offered on a purely intrastate basis. The Court did not make an independent finding of fact that voice mail service is intrastate. Indeed, it is not the function of a reviewing court to make independent findings of fact.

[34] The commenters cited at note 24, argue that the Commission has jurisdiction over the interstate portion of jurisdictionally mixed enhanced services.

[35] Georgia PSC Comments at 21-22, DC PSC Comments at 5-6, NARUC Comments at 12.

[36] BellSouth Petition at 10-12.

[37] BellSouth Reply Comments at 2.

[38] Bell Atlantic Comments at 1-3; NYNEX Comments at 3; Prodigy Services Comments at 1; MessagePhone Comments at 4-5; California Bankers Comments at 2-5,8; Unisys Comments at 2; IBM Comments at 13; Central Telephone Comments at 2; Information Industry Assn. Comments at 9; BT North America Reply Comments at 2.

[39] California PUC Comments at 10-11.

[40] New York DPS Reply Comments at 1-3.

single interstate transaction.[41] The Georgia PSC additionally argues that BellSouth cannot demonstrate that the state regulation goes as far as to thwart or impede federal objectives.[42]

14. BellSouth's voice mail service is provided and marketed, and uses the same equipment and underlying basic, services, without regard to the jurisdictional nature of a customer's use of the service in general or for a particular call. Effectuation of the Georgia PSC's *Order* so that it "freezes" only the intrastate portion of the voice mail service while not affecting the interstate portion would require BellSouth to continue to provide and market the interstate portion while not providing and marketing the intrastate portion. This would require a way to identify the origin of every call to the voice mail service so that the intrastate use could be blocked. However, it is not now technically feasible for BellSouth to do so.[43] Thus, BellSouth would not be able to jurisdictionally identify calls so as to permit interstate ones to be completed to the voice mail service and intrastate ones to be blocked. Moreover, because the Georgia PSC freeze applies only to new customers, to comply with it without affecting interstate use would require BellSouth additionally to distinguish operationally between existing customers and new customers, and permit completion of all calls for the former while blocking intrastate, but not interstate, calls for the latter. Given these operational and technical difficulties, it is not feasible for BellSouth to bar the intrastate portion of the voice mail service without also barring the interstate portion.

15. Complying with the Georgia *Order* only for the intrastate portion of the voice mail service additionally assumes that BellSouth could market an interstate-only voice mail service.[44] We have recently explained in a closely related area why it is not feasible to market interstate and intrastate enhanced services separately.[45] Most customers want voice mail service for both interstate and intrastate use.[46] Given that most users will want both jurisdictional usages, it is not likely that a separate interstate service would find acceptance, especially in the mass market.[47] Even if a separate interstate service were extremely inexpensive, a customer who wanted both jurisdictional services would find it uneconomical and unnecessary to subscribe to a BellSouth interstate service and a competitor's service that offered both interstate and intrastate portions. It would additionally be necessary to seek to explain to customers why intrastate use was unavailable. Therefore, it is additionally not feasible to comply with the Georgia *Order* only for the intrastate portion of the service because it is not possible to market an interstate voice mail service separately.

16. Apart from the foregoing, it is not realistic to expect that the carrier will undertake the expense and difficulties of seeking to offer an interstate-only voice mail service on a temporary basis. Instead, as is the case before us, the carrier will halt all sales of the service for both interstate and intrastate use, depriving customers of an interstate telecommunications capability they want.[48] Effectuation of the state bar thus will, as a practical matter, bar the interstate provision of the service as well as the intrastate provision.

17. *Preemption Analysis.* Section 2(a) of the Communications Act specifically grants the Commission jurisdiction over "all interstate and foreign communicatins by wire or radio."[49] At the same time, Section 2(b) of the Act retains for the states "jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for in connection with intrastate communications by wire..."[50] Given this split in jurisdictional authority, the question as to when and under what circumstances the FCC may preempt state regulation of an intrastate matter has arisen quite often.

18. The Supreme Court, in *Lousiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) articulated the test for determining when preemption is consistent with Section 2(b) of the Act. The Commission may preempt state regulation when the state regulation would thwart or impede the exercise of lawful federal authority over inter-

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[41] Florida PSC Comments at 3-5.

[42] Georgia PSC Comments at 17.

[43] BellSouth Reply Comments at 16-17. As the terminating LEC on interLATA calls, BellSouth currently receives no information on the origin of calls which it can pass on to the voice mail service. Automatic Number Identification (ANI) is not transmitted by the interexchange carrier to the terminating LEC which passes the call to the voice mail service. ANI, which is the billing number of the caller, is transmitted on most interLATA calls. ANI, however, provides a billing number, not the caller's telephone number, and does not necessarily disclose his location. In addition, ANI is not transmitted by the interexchange carrier to the terminating LEC, but only from the originating LEC to the interexchange carrier for billing purposes. The caller's telephone number and corresponding location are currently available to the voice mail service if a call is handled entirely by a single LEC that transmits the Calling Party Number via SS7 signalling where that technology has been deployed. That information is not available in other circumstances.

[44] Both the New York DPS and the Florida PSC attempt to find distinctions between basic and enhanced services in previous preemption cases. The New York DPS argues that the North Carolina Utility Cases, *NCUC v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. den.*, 429 U.S. 1027 (1976) and *NCUC v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. den.*, 436 U.S. 874 (1977), should not control here because the state regulation preempted in those cases involved a basic service. New York DPS Reply Comments at 3. The *NCUC* courts made no such distinction. The Florida PSC argues that BellSouth cannot rely on the authority of *NARUC v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984), because that case also involved a basic service. Florida PSC Comments at 4. While BellSouth's voice mail service is an enhanced service, that fact does not limit our authority to preempt. We have found that enhanced services are not within our Title II jurisdiction, but are subject to our ancillary jurisdiction. The Court of Appeals for the District of Columbia Circuit has held specifically that there is "no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction." *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198,217 (D.C. Cir. 1982, *cert. denied*, 461 U.S. 938 (1983). *See also California v. FCC*, 905 F.2d 1217, 1239-43 (9th Cir. 1990) (FCC's authority to preempt state regulation of enhanced services is unaffected by whether its own regulation arises under Title II or under its ancillary authority).

[45] *BOC Safeguards Order.*

[46] BellSouth Reply Comments at 12-13.

[47] BellSouth Petition at 12, 19-20.

[48] BellSouth Petition at 3-4.

[49] 47 U.S.C. Section 152(a).

[50] 47 U.S.C. Section 152(b).

state communications, such as when it is not "possible to separate the interstate and intrastate portions of the asserted FCC regulation."[51]

19. In this particular instance, this test has been met. As discussed in detail above, it is impossible as a practical matter to separate the interstate and intrastate provision of BellSouth's voice mail service to permit effectuation of the Georgia *Order* only for the intrastate provision of the service. As indicated, application of the *Order* to the intrastate provision of the service will also "freeze" the interstate provision of the service.

20. Furthermore, we have recently instituted a comprehensive regulatory framework to govern provision of enhanced services by the BOCs.[52] That framework governs BOC provision of interstate enhanced services, including BellSouth's interstate voice mail service.[53] This regulatory approach to the regulatory framework, among several alternatives, that will best permit BOCs to make use of their substantial telecommunications resources to provide interstate enhanced services to the public, especially to the mass market. BellSouth provides its voice mail service under that regulatory framework, pursuant to a CEI plan approved by the Commission. The Georgia *Order*, however, "freezes" BellSouth's provision of any voice mail service to new customers until state safeguards are implemented, even if the service is provided under an FCC-approved CEI plan.[54] Because the Georgia *Order* bars provision of any voice mail service to new customers, it effectively establishes a state determination as to when the carrier may provide its interstate enhanced service and displaces the federal public interest determination providing for BOC provision of interstate enhanced services. Obviously, for as long as it remains in effect, the Georgia *Order* negates the federal permission to BellSouth to provide its interstate voice mail service. Accordingly, we find that the Georgia *Order* thwarts achievement of important federal objectives that were sought by our comprehensive regulatory framework governing BOC participation in the enhanced services marketplace.

21. We are generally reluctant to preempt state authority over intrastate communications. Whenever possible, we have sought to let proceedings at the state level move to completion if that may eliminate the need for preemption, especially where state proceedings are moving expeditiously.[55] In this case, eight months have elapsed since BellSouth filed its petition.[56] It is uncertain when proceedings will be concluded.[57]

III. CONCLUSION

22. As discussed above, the state order, as long as it remains in effect, thwarts achievement of the federal public interest objectives that led us to adopt our comprehensive regulatory framework governing BOC participation in the enhanced services marketplace. Accordingly, given the practical jurisdictional inseverability of BellSouth's voice mail service for purposes of implementing the state action here at issue, we preempt the Georgia PSC's "freeze" of BellSouth's offering of voice mail service. BellSouth may resume offering its voice mail service in Georgia to new customers upon the effective date of this *Memorandum Opinion and Order*.[58] Our decision here does not address any aspect of the Georgia PSC's proposed regulatory controls. We address only the Georgia *Order's* "freeze" of provision by BellSouth of its voice mail service offered in the state.

23. Accordingly, IT IS ORDERED, That the Petition for Emergency Relief and Declaratory Ruling filed by the BellSouth Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[51] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986). *See also Maryland Public Service Comm'n v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1217); *Texas Public Utility Comm'n v. FCC*, 886 F.2d 1325, 1331 (D.C. Cir. 1989); *National Association of Regulatory Commissioners v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104, 116 (D.C. Cir. 1989); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

[52] *BOC Safeguards Order*, n.5, *supra*.

[53] In the *BOC Safeguards Order* we preempted state requirements for structural separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services, state CPNI rules requiring prior authorization that is not required by our rules, and state network disclosure rules that require initial disclosure at a time different from the federal rule. The Commission determined that these state requirements would thwart or impede the nonstructural safeguards pursuant to which AT&T, the BOCs, and the independents may provide interstate enhanced services and the federal goals that they are intended to achieve. The Commission declined to preempt state structural separation requirements pertaining to purely intrastate enhanced services and those requirements mandating only the establishment of separate corporations and separate books of account for the BOC provision of enhanced services. The Commission also declined to preempt state nonstructural regulations apart from those specific actions mentioned above.

[54] *Order* p. 48.

[55] *See, e.g., Atlantic Richfield Co.*, 3 FCC Rcd 3089 (1988), *aff'd Texas Public Utility Commission v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989).

[56] The Georgia PSC has requested a cost study and other information from BellSouth. See Letters from B. B. Knowles, Director Utilities Division, Georgia Public Service Commission to Marty Dickens, Assistant Vice President, Southern Bell Telephone Company, June 27, 1991 and November 14, 1991. BellSouth contends that it has submitted to the Georgia PSC all nonproprietary cost information requested by the Georgia PSC and will submit proprietary cost information pursuant to an appropriate protective agreement or protective order. BellSouth Reply Comments at 39.

[57] It is also possible that the state may not lift the freeze even after completion of its proceeding. The Georgia *Order* states at one point that the Georgia PSC will "review" the freeze when state regulatory controls are implemented. *Order* at 71.

[58] Pursuant to Sections 1.103 and 1.4(b) of the Commission's rules, 47 C.F.R. Sections 1.103 and 1.4(b), this *Memorandum Opinion and Order* is effective upon release.

APPENDIX

PARTIES FILING COMMENTS IN THIS PROCEEDING

ADT Security Systems, Inc.
ATC
American Newspaper Publishers Association
Association of Telemessaging Services International*
Bell Atlantic
BellSouth***
BT North America Inc. **
California Bankers Clearing House Association
California Public Utilities Commission*
Central Telephone Company
CompuServe
Cox Enterprises, Inc.
District of Columbia Public Service Commission*
Florida Public Service Commission**
Georgia Public Service Commission
Information Industry Association
International Business Machines Corporation*
Kentucky Public Service Commission**
MCI*
MessagePhone, Inc.
National Association of Regulatory Utility Commissioners
New York Department of Public Services**
NYNEX Telephone Companies
Prodigy Services Company
Unisys Corporation
US Sprint Communications Co. Ltd.

* Filed both Initial and Reply Comments
** Filed Reply Comments only
*** Filed Petition and Reply Comments

Decision 98-10-057 October 22,1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995)

OPINION

By this order, we affirm our jurisdiction over telephone traffic between end users and Internet Service Providers (ISPs), and determine that such calls are subject to the bill-and-keep or reciprocal compensation provisions of applicable interconnection agreements.[1]

Background

On March 18, 1998, the California Telecommunications Coalition (Coalition)[2] filed a motion in the Local Competition Docket seeking a ruling

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[1] Under standard reciprocal compensation provisions of interconnection contracts, the cost of providing access for a customer's local call that *originates* from one local exchange carrier's network and *terminates* on another local exchange carrier's network is attributed to the carrier from which the call originated. (47 CFR Sec. 51.701(e), 51.703 (1997).) Such "local" calls are distinct from "long distance" calls which merely pass through interexchange switches and involve access charges rather than reciprocal compensation fees.

[2] For purposes of the Motion, the Coalition consists of the following parties: ICG Telecom Group, Inc., Teleport Communications Group, Inc., MCI Telecommunications

Footnote continued on next page

regarding the jurisdictional status and billing treatment of telephone calls utilizing a local exchange number to access ISPs. Disputes have arisen in interconnection agreements over which carrier should pay for the cost of terminating calls originated by customers of the incumbent local exchange carrier (ILEC) to access ISPs which, in turn, are telephone customers of a competitive local carrier (CLC). Typically, an ISP purchases telephone lines located within the local calling area of its customers to provide Internet access by having the customer dial a local number over an ordinary telephone line. Such calls are rated as local, thus allowing the caller to utilize the ISP's service without incurring toll charges. The ISP then converts the analog messages from its customers into data "packets" that are sent through its modem to the Internet and its host computers and servers worldwide.

The Coalition seeks a Commission order affirming that such calls to ISPs should be treated as local calls, under Commission jurisdiction, and subject to the bill-and-keep or reciprocal compensation provisions of applicable interconnection agreements. The Coalition seeks generic resolution of this issue within R.95-04-043, the Local Competition Docket in light of the position advanced by Pacific Bell (Pacific) claiming that calls to an ISP constitute interstate calls. Pacific believes such calls are not subject to this Commission's jurisdiction, and do not qualify for the reciprocal compensation arrangements which are applicable only to local calls. The Coalition claims that, as a result of Pacific's position, CLCs are being unfairly deprived of compensation for terminating ISP traffic. Two complaint cases currently pending before the Commission raise this

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Corporation, Sprint Communications Co., L.P., Time Warner AxS of California, L.P., Teligent, Inc., California Cable Television Association.

same issue in the context of specific interconnection agreements in dispute. The Coalition expresses concern that the two complaint cases are likely only the first of many more disputes to come if the Commission does not resolve this issue generically in this proceeding.

Responses to the Coalition's motion were filed on April 2, 1998. Responses in support of the motion were filed by various parties representing CLCs. Responses in opposition to the motion were filed by the two large incumbent local exchange carriers (ILECs), Pacific and GTE California (GTEC), and by two separate groups of small ILECs.[3] Comments were also filed by Roseville Telephone Company. On April 16, 1998, the Coalition filed a reply to the responses of Pacific and GTEC. On May 8, 1998, Pacific and GTEC each filed a further response to the reply of the Coalition. We have taken parties' comments into account in resolving this dispute.

Position of Parties

The Coalition argues that ISP traffic meets the definition of a local call, and is subject to this Commission's jurisdiction as intrastate traffic, subject to reciprocal compensation requirements. The Coalition measures call "termination" at the point where the call is delivered to the telephone exchange service bearing the called number. The Coalition claims that where an ISP uses a phone line located within the local calling area of its customers, the calls to the

[3] One group of the small ILECs filing comments was comprised of Evans Telephone Company, Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Co., Pinnacles Telephone Company, The Siskiyou Telephone Company, The Volcano Telephone Company, and Winterhaven Telephone Company. A second group of small ILECs was composed of Calaveras Telephone Company, California-Oregon Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., The Ponderosa Telephone Company, and Sierra Telephone Company.

ISP terminate when the ISP's modem answers the customers' incoming calls over local phone lines.

The Coalition thus views ISP service as constituting two separate segments, the first of which is a basic local telecommunication service, with the end user's call terminating at the ISP modem. The Coalition views the second segment as a separate data transmission which does not involve telecommunications service, but which is an enhanced information service utilizing worldwide computer networks. If the call did not terminate at the ISP modem, reasons the Coalition, then the ISP would have to be a telecommunications carrier, providing long distance service. Yet, the ISP is treated as a customer by the underlying telecommunications carriers providing the ISP service. In further support of its view that ISP traffic is intrastate in nature, the Coalition cites the FCC's *Access Charge Order* which prescribes that Information Service Providers may purchase services from ILECs under the same intrastate tariffs available to end users.

Other parties representing CLCs support the Coalition's motion, arguing that they have developed business plans based in part on the current industry practice of reciprocal compensation for local calls to ISPs. The CLCs state that the dispute over this issue creates an unacceptable level of uncertainty, warranting expedited Commission action affirming that current industry practice is correct.

The ILECs oppose the Coalition's motion, arguing that ISP traffic is not local, but is interstate in nature, and thus, not subject to this Commission's jurisdiction. As such, the ILECs argue that the Commission has no authority to require reciprocal compensation for termination of ISP traffic, which they claim is subject exclusively to FCC jurisdiction.

Pacific acknowledges that the FCC has permitted ISPs to purchase ILEC services under intrastate tariffs and has exempted ISPs from access charges, but characterizes such actions merely as indicators that the FCC has jurisdiction over these services, but has chosen for policy reasons to forbear from treating the calls as interstate with respect to access charges. The ILECs claim that the very fact that the FCC has exempted Information Service Providers from federal access charges demonstrates that it has jurisdiction over such calls, otherwise the FCC would have had no authority in the first place to grant an exemption for such calls.

The ILECs deny that calls to ISPs "terminate" at the ISP's modem, but argue that such calls remain in transit through the modem for further relay across state and national boundaries via the Internet. As such, the ILECs define ISP traffic as interstate based on the fact that the ISP sends and receives data transmitted to its local customers which may involve access to computer networks located outside of California or even outside of national boundaries. GTEC argues that a communication must be analyzed, for jurisdictional purposes, from its inception to its completion. GTEC seeks to draw an analogy between the intermediate switching of interstate calls of long distance carriers and the transmission performed by the ISP modem, connecting to worldwide web sites.

GTEC argues that ISP calls involve both intrastate and interstate elements, and as such, are inseverable for jurisdictional purposes. GTEC cites the *Memory Call* case, arguing that in it, the FCC applied an end-to-end analysis to BellSouth's voicemail service to conclude that it was jurisdictionally interstate, even though it utilized an intrastate call forwarding service to allow out-of-state callers to retrieve messages. GTEC argues that a similar analysis should apply to ISP traffic, thereby rendering it jurisdictionally interstate. (Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp, 7 FCC Rcd 1619 (1992).)

The small ILECs raise concern over the impact on their operations if the Commission ruled that ISP traffic be assigned to the intrastate jurisdiction. The rates and revenues of the small ILECs' depend in large measure on calculations based on intra-and-interstate calling traffic ratios. The small ILECs claim that the potential revenue shifts caused by the changes in jurisdictional assignments of the sort addressed in the Motion are so significant that Congress requires such matters to be referred to the Federal-State Joint Board. The small ILECs question the jurisdiction of the Commission to unilaterally decide the jurisdictional assignment of any traffic.

The Coalition also presents a summary of rulings which have been issued by other state commissions concerning whether reciprocal compensation should apply to local calls terminating with ISP end users. The Coalition claims that every state commission that has issued a final decision on this issue has ruled that reciprocal compensation should apply to such calls. While acknowledging that such actions are not binding on this Commission, the Coalition views such decisions as useful information, illustrating how other jurisdictions faced with this same issue have resolved it. In addition, the National Association of Regulatory Utility Commissioners (NARUC) passed a resolution at its November 1997 meeting concluding ISP traffic should remain subject to state jurisdiction.

GTEC discounts the significance of the orders from other jurisdictions cited by the Coalition, arguing that most of the cited orders merely involved interconnection complaints under specific contracts or arbitration proceedings which barely touched upon the ISP traffic issue. To the extent that the cited orders do rule that reciprocal compensation applies to ISP traffic, GTEC claims that the reasoning underlying the orders is faulty.

Discussion

The first issue to be resolved is whether calls to an ISP constitute interstate or intrastate local traffic. The question of whether ISP traffic is defined as local or as interstate has a bearing on whether such calls come within the jurisdiction of this Commission and also whether such calls are subject to reciprocal compensation arrangements. Reciprocal compensation provisions of interconnection agreements only apply to local communications, that is, traffic originating and terminating within a local calling area.

There is no question that the Internet services offered by an ISP involves the transmission of information beyond the boundaries of a local calling area, and which may, in fact, span the globe. The Internet itself is an interstate network of computer systems. The question, however, is whether this network of computer systems comprising the Internet can properly be characterized as a telecommunications network for purposes of measuring the termination point of a telephone call to access the Internet through an ISP. Parties dispute whether such Internet communications can properly be disaggregated into separate components, one involving the telecommunications network, and one that does not. We must consider whether the transmission of data which occurs beyond the ISP's modem constitutes an indivisible part of a total telecommunications service. This question, in turn, depends on how we define a telecommunications service and how such service is terminated.

GTEC argues that the Coalition's attempt to sever the ISP communication into separate intrastate and interstate segments is contrary to legal precedent, but that a communication must be analyzed, for jurisdictional purposes, "from its inception to its completion." (See *Teleconnect Co. v. Bell Te. Co. of Penn. et al.*, 10 FCC Rcd 1626, 1629-30 (1995), aff'd *Southwestern Bell Tel. Co. v. FCC*, No. 95-119 (D.C. Dir. June 27, 1997). GTEC cites a case in which the FCC found that a telephone service was interstate and thus subject to FCC jurisdiction even though the originating caller reached a local telephone number from out of state using foreign exchange and common control switching arrangement services. The service permitted an end user in New York to call an out-of-state customer by dialing a local number and paying local rates. GTEC claims this case is analogous to the dispute over ISP traffic, arguing that both instances involve the use of intrastate local services, in part, to complete an interstate call.

GTEC also cites the *Memory Call* case where the FCC concluded that voice mail service is subject to interstate jurisdiction even though out-of-state callers could retrieve messages using an intrastate call forwarding service. GTEC cites the FCC findings that:

> "The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology. Jurisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination...This Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with the origination and termination of interstate calls." (Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp., 7 FCC Rcd 1620-21 (1992).)

We disagree with GTEC's claim that the FCC's assertion of jurisdiction over voicemail service as cited in the *Memory Call* case has applicability to the ISP issue before us here. Even in instances where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, the FCC ruled that "state regulation of the intrastate service that affects interstate service will not be preempted unless it thwarts or impedes a valid federal policy." (*Id., at 1620 (para. 6)*.) Thus, even if ISP traffic did involve the jurisdictional mixing of interstate and intrastate services, state regulation of the intrastate portion of the service would not be preempted since no federal policy is being thwarted or impeded by requiring that such ISP traffic be considered local. The FCC has not issued any regulation on this matter.

Moreover, contrary to its treatment of voice mail and telephone services, the FCC has not categorized Internet use via local phone connections as a single end-to end telecommunications service. The FCC has instead defined Internet connections as being distinctly different from interstate long-distance calls. For example, in its decision not to apply interstate access charges to ISPs, the FCC noted that, "given the evolution in ISP technologies and markets since access charges were first established in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs [long-distance interexchange carriers]." First Report and Order In Re Access Charge Reform. (12 FCC Rcd 15982 at ¶ 345 (Released May 16, 1997).)

Likewise, in the FCC's Report and Order In Re Federal-State Joint Board on Universal Service, 12 F.C.C.R. 8776 (Released May 8, 1997) ("Report and Order"), the FCC concluded that "Internet access consists of more than one component." (*Id.* at ¶ 83.) The FCC reasoned that "Internet access includes a network transmission component, which is the connection over a [local exchange] network from a subscriber to an Internet Service Provider, in addition to the underlying information service." (*Id.*)

The FCC has found that "Internet access services are appropriately classified as information, rather than telecommunications, services." Report to Congress in re Federal-State Joint Bd. On Universal Service, FCC 98-67 at ¶ 73 (Released April 10, 1998). The FCC has affirmed that the categories of "telecommunications service" and "information service" are mutually exclusive. The FCC further concluded that: "Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport." (*Id.*) In contrast to a telecommunications service, the FCC found that: "[t]he Internet is a distributed packet-switched network... [where the] information is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination." (*Id.* at ¶ 64.12.)

The FCC further explained how the service offered by an ISP differs from a telecommunications service:

> "Internet access providers typically provide their subscribers with the ability to run a variety of applications ....When subscribers store files on Internet service provider computers to establish 'home pages' on the World Wide Web, they are, without question, utilizing the provider's capability for . . . storing . .. or making available information" to others. The service cannot accurately be characterized from this perspective as 'transmission, between or among points specified by the user'; the proprietor of a Web page does not specify the points to which its files will be transmitted, because it does not know who will seek to download its files. Nor is it 'without change in the form or content,' since the appearance of the files on a recipient's screen depends in part on the software that the recipient chooses to employ. When subscribers utilize their Internet service provider's facilities to retrieve files from the World Wide Web, they are similarly interacting with stored data, typically maintained on the facilities of either their own Internet service provider (via a Web page 'cache') or on those of another. Subscribers can retrieve files from the World Wide Web, and browse their contents, because their service provider offers the 'capability for. . . acquiring, .. . retrieving [and] utilizing. . . information.'" (*Id.* at ¶ 76 (citations omitted); Report and Order, 12 F.C.C.R. 8776 at ¶ 83.)

The FCC's description of Internet service makes it clear that the transmission beyond the ISP modem is an information service, not a telecommunications service. The ISP does not operate switches as does a telecommunications carrier, and does not switch calls to other end users. Rather, the ISP answers the call, signifying that the telecommunications service is terminated at the ISP modem. Once the ISP connection with the local caller is established, the ISP uses its computer network capabilities to send and receive data transmissions over the Internet. These information transmissions are performed utilizing technologies which are independent of the public switched telecommunications network. Moreover, the ISP is not certificated as a telecommunications carrier, and its own manipulations of data transmissions through the Internet computer network cannot properly be defined as a telecommunications service for purposes of measuring where ISP traffic is terminated. Likewise, the transmission of data through the Internet cannot reasonably be construed as an interstate telecommunications service simply because the Internet can route information from worldwide sources.

GTEC argues that the FCC's granting of an exemption from federal access charges to Information Service Providers constitutes a valid inference that the FCC exclusively regulates traffic. We disagree. The FCC's Access Charge Order was limited to interstate ISP traffic. The FCC did not assert exclusive jurisdiction over intrastate ISP issues. The FCC has historically exercised its jurisdiction over telephone carriers providing interstate enhanced services pursuant to its ancillary jurisdiction under Title I, 47 USC, Sec. 151-155. In 1990, however, the Ninth Circuit Court considered the jurisdictional issue of whether the FCC could preempt the state from the regulation of the intrastate enhanced services offered by carriers. The Ninth Circuit ruled that the state's jurisdiction over carrier-provided intrastate service does not intrude upon the FCC's jurisdiction over interstate enhanced services. The Ninth Circuit explained:

> "[T]he broad language of Sec. 2(b)(1) [of the Communications Act] makes clear that the sphere of state authority which statute 'fences off from FCC reach or regulation, *Louisiana PSC, 476 US at 370,* includes, at a minimum, services that are delivered by a telephone carrier 'in connection with' its intrastate common carrier telephone services. <u>When telecommunications services are delivered on an</u>

> intrastate basis by telephone carriers over telephone lines, they at the very least qualify as services 'in connection with intrastate communication service by wire ....of any carrier.' (47 USC Sec. 152(b)(1).) That these enhanced services are not themselves provided on a common carrier basis is beside the point. As long as enhanced services are provided by communications carriers over the intrastate telephone network, the broad 'in connection with' language of Sec. 2(b)(1) places them squarely within the regulatory domain of the states." (Emphasis added.)

Based on the analysis above, we find that ISP service does constitute two separate components, one of which is a telecommunications service, and the other which is not. Under the 1996 Telecommunications Act, Congress separately defined "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." (47 USC 153(43).) On the other hand, Congress defined "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service." (47 USC 153(20).) As an information service provider, the ISP is an end user with respect to the termination point of a telecommunications service.

Consistent with the FCC's characterization of Internet service, we conclude that the relevant determinant as to whether ISP traffic is intrastate is the distance from the end user originating the call to the ISP modem. If this distance is within a single local calling area, then we conclude that such call is a local call, and subject to this Commission's jurisdiction. In contrast, long distance voice calls terminate at a remote location outside of the local calling area.

Pacific argues that the telephone numbers for the ISP modem may be located in a different LATA from the CLC switch through which the call passes. In such instances, Pacific argues, the call would not be local, but would be a toll call. While we agree that such calls would be toll calls, we find such an argument to be a red herring. Our finding remains unchanged that the rating of calls should be treated in a consistent manner whether they happen to involve an ISP or any other end user. If the call originates and terminates within the same local calling area, it should be treated as local.

Our finding that calls to the modem of an ISP constitute local telephone traffic does not contradict case law finding that Internet transactions may involve interstate commerce or that the "nature" of a communication, not the physical location of telecommunications facilities, is the proper determinant of FCC jurisdiction. The exercise of jurisdiction by the FCC and Congress includes authority over the Internet's information service component which involves transmissions across computer networks beyond the ISP modem and the transactions which occur over those networks. The jurisdiction of this Commission covers the intrastate telephone line connection between the ILEC's end user and the ISP modem.

The treatment of an ILEC customer call to an ISP modem as a local call is consistent with our Consumer Protection rules adopted in this proceeding where we defined a "completed call or telephonic communication to be a "call or other telephonic communication, originated by a person or mechanical device from a number to another number which is answered by a person or mechanical/electrical device." (D.95-07-054, App.B, Sec. 2.5.) Based on this definition, the ISP call is properly viewed as terminating at the ISP modem, at which point the originating call is answered, and the ISP connection established. Accordingly, the determination of whether the call is local is based upon whether the rate centers associated with the telephone numbers of the end user and the ISP provider are both within the same local calling area.

Thus, we conclude that we have jurisdiction over the intrastate telecommunications service component of ISP traffic, and thus have authority to deem these calls local.

Payment of Reciprocal Compensation Fees

Parties' Positions

The Coalition claims that CLCs are being unfairly deprived of reciprocal compensation fees for terminating the ISP traffic originated by ILEC customers. The Coalition claims Pacific has violated PU Code Sec. 453 by refusing to treat calls to ISPs as local calls eligible for reciprocal compensation. Sec. 453 prohibits public utilities from granting "any preference or advantage to any corporation or person" or subjecting "any corporation or person to any prejudice or disadvantage" as to "rates, charges, service, facilities or in any other respect ...as between classes of service." The Coalition claims that while Pacific collects local measured usage or Zone Usage Measurement (ZUM) Zone 3 charges on the party originating calls to Pacific's own Internet access service , Pacific discriminates against CLCs by refusing to share this revenue for calls from ILEC customers to ISPs served by CLCs. Pacific also receives revenues on flat rate service ($11.25 per month) over the rate for measured rate service ($6.00 per month). The Coalition cites this $5.25 per month differential as compensation for Pacific's costs for usage associated with flat rate service for which there is no extra charge. Likewise, GTEC receives usage revenue on ISP calls, ZUM Zone 3 revenues, and a $7.25 increment over measured rate service in its flat rate charge.

Because Pacific does not share any compensation received from such callers with the CLC that incurs the cost to terminate the call to the ISP, the

Coalition claims such differential treatment produces an unfair competitive edge for Pacific and violates Sec. 453(a) and (c). The Coalition argues that CLCs are entitled to receive compensation for terminating inbound calls in the same manner as Pacific and its own Internet operations do. As the volume of ISP traffic continues to grow at explosive rates, the Coalition argues, the CLCs' burden of terminating ISP calls correspondingly grows greater.

Pacific denies the charge that it has violated Sec. 453, arguing that most of its customers pay no additional charge for each individual local call, but are subject generally to local flat rate service. Likewise, Pacific's customers do not pay ZUM Zone 3 charges for ISP calls since CLCs specifically assign telephone numbers to ISPs from NXX codes that permit customers to avoid such charges. Pacific claims that its prices of $11.25 for flat rate service and $6 for measured rate service do not even cover its costs of providing local service to its own customers, much less the costs associated with calls from its customers to ISPs serviced by a CLC. Pacific argues that these prices were not designed to cover the costs associated with ISP usage where customers maintain their connection to the ISP for extended periods of time. Thus, Pacific denies that it collects any surplus revenues for ISP calls which can be shared with CLCs.

Pacific claims that it would be confiscatory to ILECs to require them to pay CLCs for the termination of ISP traffic. Since virtually all of the ISP traffic is one-way, Pacific argues, the compensating per-minute termination charges would likewise flow asymmetrically to the CLCs that have the customer relationship with the ISPs. The ILEC would thus pay both the costs of originating and terminating ISP traffic.

The ILECs argue that, even if the Commission concludes that it has jurisdiction over such calls, reciprocal compensation for ISP traffic should not be authorized as a matter of policy. Because ISPs receive calls, but almost never originate calls, the CLC would receive payment for terminating ISP traffic, but would seldom, if ever, pay for termination of outgoing calls originating from the ISP. At the same time, the ILEC would have to bear the call origination costs plus the per-minute charges paid to the CLC for terminating the call. The ILECs claim such an arrangement would place an unfair and extraordinary burden on the carrier which originates the call. On the other hand, the CLCs argue that it is they who are disadvantaged by the obligation to terminate calls originated by the ILECs' customers to ISPs.

The ILECs warn that, if ISP traffic is deemed local, and the Commission requires that reciprocal compensation fees apply to ISP traffic, CLCs stand to gain millions of dollars in one-way reciprocal compensation payments under interconnection agreements with the ILECs, thereby subsidizing CLCs' businesses and undermining local competition. GTEC argues that no local carrier would voluntarily serve a subscriber if it stands to pay more in reciprocal compensation fees than it receives for providing local telephone service to the subscriber. Pacific argues that the payment of termination fees to the CLCs for ISP traffic will create an incentive for CLCs to "game" the system in a competitively abusive manner. Pacific claims that instead of charging ISPs to connect to the CLC network, the CLC can remit some of their reciprocal compensation fees to pay the ISPs for connecting the CLCs in the first place. Pacific believes the payment of reciprocal compensation fees for ISP traffic creates the wrong incentives encouraging such marketing practices.

Discussion

We conclude that provisions applicable to interconnection agreements should apply to the termination of ISP calls as they do to any other local calls. We are unpersuaded by the argument that the payment of termination fees to CLCs for ISP calls is inherently unfair. Parties to the interconnection agreements which are subject to reciprocal compensation for local calls voluntarily agreed to such a provision. In the initial phase of the Local Competition proceeding, both Pacific and GTEC advocated the adoption of reciprocal compensation for call termination. The contractual obligation to pay such charges does not disappear merely because the balance between incoming and outgoing calls is asymmetrical or not to the liking of one party or the other.

The telecommunications network functions that are required to terminate ISP traffic are no different from the functions required to terminate local calls of any other end user. The CLCs incur costs to terminate calls to ISPs just as they do for other calls. Likewise, the ILEC is relieved of the burden of terminating such traffic. We find no legal basis for treating ISP traffic differently from the traffic of any other similarly situated end users.

The fact that such calls flow predominantly in one direction does not negate the costs involved in terminating traffic, nor justify denying carriers compensation for the termination of local calls to which they are otherwise entitled. The U.S. District Court for the Northern District of California has recently upheld the principle that reciprocal compensation obligations are not invalidated merely because the directional flow of terminating traffic is not symmetrical. In upholding the reciprocal compensation provisions of an interconnection agreement involving a one-way paging carrier, the Court stated:

> "The Court agrees with Cook and the CPUC that nothing in the Act precludes one-way carriers such as Cook from entering into reciprocal compensation agreements with LECs. The Act requires only that the agreements be 'reciprocal' in that each carrier agrees to pay the other for the benefits it receives from the other carrier when the other carrier terminates a call that originates with the first carrier. The compensation agreement between Cook and Pacific Bell does so. Nothing in the statute's language indicates that such compensation agreements are not required if a disproportionate number of calls

> will originate with the facilities of one carrier or if no calls will originate with those of the other carrier." (Pacific Bell v. Telecom, Inc., U.S. D. C.; Judgment No. C97-03990 Civ.; September 3, 1998)

The imbalance in ISP traffic flow merely reflects the fact that vast majority of telephone customers still are served by an ILEC and thus, most calls will originate with ILEC customers. The ILECs benefit from the huge share of the market they still possess, and generate at least some revenue from the calls to ISPs which are originated by ILEC customers and which terminate on the network of the CLC. For example, the differential rate for flat rate service in excess of measured rate service represents such a source of revenues. Also, the presence of the ISPs enhances the incentive for ILEC customers to purchase second phone lines from which further revenue is generated. It is not confiscatory merely to require the ILEC to compensate the CLC for terminating such calls in conformance with the freely negotiated reciprocal compensation provisions of applicable interconnection agreements. The CLC performs a necessary function in terminating ISP traffic, thus enabling the communication to be completed. Moreover, as the volume of such traffic increases, the burden on CLCs to provide for the termination of such traffic correspondingly increases. Absent a compensation agreement, the CLC terminating the ILEC customer's call receives no compensation for its termination. It is therefore equitable that the CLC be compensated through termination fees applicable to local calls.

There is nothing discriminatory in requiring that reciprocal compensation apply to ISP traffic since the obligation for reciprocal compensation applies to all carriers, not just to the ILECs. Thus, where calls are originated by CLC customers and terminated by an ILEC to its own ISP customer, the CLC must pay termination fees to the ILEC on whose network the call was terminated. In a competitive local exchange market, ILECs are free to compete for the business of an ISP. If the termination charge is not set at a level which corresponds to the costs incurred in terminating a call, the proper remedy is not to void the requirements of the interconnection agreement prescribing recovery of a termination charge. Rather, the proper remedy would be for the termination charge to be negotiated between the parties to recognize the appropriate costs of call termination and in view of the corresponding revenues received by the carrier on whose network the call is originated. ILEC can renegotiate the interconnection agreements when they terminate to achieve this outcome.

Impacts on Interstate/Intrastate Calling Ratios

We are unpersuaded by the arguments of the small ILECs that we should refrain from deciding the jurisdictional status of ISP traffic because it could adversely affect the revenues of the small ILECs which is based on intrastate-interstate calling traffic ratios. Our ruling that ISP traffic is intrastate is consistent with the manner in which such traffic has been treated in interconnection agreements historically prior to the recent change initiated by Pacific in questioning the validity of such treatment. In any event, to the extent that a small ILEC believes it will experience a material revenue impact as a result of a change in jurisdictional calling traffic ratios, it may seek recourse through its general rate case process.[4] Therefore, the issues resolved in this order concerning our jurisdiction over ISP traffic should not have any adverse impact on the traditional

[4] The dominant large ILECs may seek any remedy they deem necessary to recover from their own end users whatever additional costs are allegedly caused by their end user's calls to ISPs. For example, the ILECs could request modification of the Commission's definition of basic service adopted in D.96-10-066 to possibly add a usage element above a certain threshold of minutes to flat rate service.

manner in which the small ILECs have determined traffic ratios for rate and revenue purposes.

Findings of Fact

1. Disputes have arisen in interconnection agreements over which carrier should pay for the cost of terminating calls originated by customers of one local carrier to access Internet Service Providers (ISPs) which, in turn, are telephone customers of another local carrier.

2. The question of whether ISP traffic is subject to call termination charges depends, in part, on whether such traffic is defined as local or as interstate, and consequently, on whether such calls come within the jurisdiction of this Commission.

3. Provision for reciprocal compensation for call termination in interconnection agreements only applies to local traffic originating and terminating within a local calling area.

4. ISP service is composed of two discrete elements, one being a telecommunications service by which the end user connects to the ISP modem through a local call, the second being an information service by which the ISP converts the customer's analog messages into data packets which are individually routed through its modem to host computer networks located throughout the world.

5. Under the 1996 Telecommunications Act (Act), "telecommunications" is defined as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." (47 USC 153(43).)

6. The Act separately defines "information" services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes

electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service." (47 USC 153(20).)

7. Even where interstate services are jurisdictionally mixed with intrastate services and facilities otherwise regulated by the states, the FCC has ruled that state regulation of the intrastate service will not be preempted unless it thwarts or impedes a valid federal policy.

8. No valid federal policy is thwarted or impeded by a state regulation ruling that reciprocal compensation provisions of interconnection agreements apply to the termination of ISP traffic on another carrier's network.

9. The U.S. Court of Appeals for the Ninth Circuit has ruled that state jurisdiction over carrier-provided intrastate enhanced services such as ISP calls does not intrude upon FCC's jurisdiction over interstate enhanced services offered by carriers.

10. The relevant determinant of whether ISP traffic is intrastate is the whether between the rate centers associated with the telephone number of an end user originating the call and the telephone number at the ISP modem where the call is terminated are both intrastate.

11. If the rate centers associated with the telephone number of the end user originating the call and the telephone number used to access the ISP modem lies within a single local calling area, then such call is a local call.

12. The issues resolved in this order concerning our jurisdiction over intrastate calls to ISPs should not have any adverse impact on the traditional manner in which the small ILECs have determined traffic ratios for rate and revenue purposes.

13. The telecommunications network functions that are required to terminate ISP traffic are no different from the functions required to terminate local calls of any other end user.

14. The fact that ISP traffic flows predominantly in one direction does not negate the costs involved in terminating traffic.

Conclusions of Law

1. This Commission has jurisdiction over transmissions originating from an end user and terminating at an ISP modem where both the end user and modem are intrastate.

2. This Commission has jurisdiction to issue an order ruling on whether a transmission terminating at an ISP is to be subject to the reciprocal compensation provisions of interconnection agreements.

3. The reciprocal compensation provisions applicable to interconnection agreements should apply to the termination of calls to ISPs as they do to any other local calls.

4. There is nothing discriminatory in requiring that reciprocal compensation apply to the ISP termination of calls to by CLCs since the obligation for reciprocal compensation applies to all carriers, not just to the ILECs.

5. It is not confiscatory merely to require the ILEC to compensate the CLC for terminating such calls in conformance with the reciprocal compensation provisions of applicable interconnection agreements.

ORDER

IT IS ORDERED that:

1. The compensation provisions of interconnection agreements shall apply to the terminating traffic sent by competitive local carriers (CLCs) to Internet Service Providers (ISPs).

2. All carriers subject to interconnection agreements containing reciprocal compensation provisions are directed to make the appropriate reciprocal payment called for in such agreements for the termination of ISP traffic which would otherwise qualify as a local call based on the rating of the call measured

by the distance between the rate centers of the telephone number of the calling party and the telephone number used to access the ISP modem until such agreements are ended. At that time, both the CLCs and incumbent local exchange carriers (ILECs) are free to negotiate whatever new revisions they can agree to for termination.

This order is effective today.

Dated October 22, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
Commissioners

We will file a dissent.

/s/ HENRY M. DUQUE
Commissioner

/s/ JOSIAH L. NEEPER
Commissioner

I will file a concurrence.

/s/ JESSIE J. KNIGHT, JR.
Commissioner